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The Right to Strike

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IN ALL the discussions, in all or most of the pontifical editorials dealing with labor unrest and strikes, we encounter the familiar phenomenon of a debate carried on in general terms which are wholly undefined. If you and I are discussing Liberty or Democracy or Human Rights, I want to know exactly what those imposing words mean to you. You ought to know what they mean to me. Otherwise the discussion ends in frustration and each of us departs convinced only that he is a sound logician and his opponent an evasive person, if not actually dishonest.

It is a pleasant and ennobling thought—that God endows each one of us with a ready-made assortment of inalienable rights and justifiable claims against the rest of the world. As a basis for eighteenth century political metaphysics, it is as fascinating an assumption as may be found. But it is an assumption, nothing more nor less, and worth no more than any other unprovable hypothesis. Dogmatists may base a system of theology on the assumption that a babe, born or unborn, is the possessor of an immortal soul; and if you grant that assumption, the theology which follows it is unassailable. If you deny that major premise, the logical theology based on it becomes nonsense.

Let us begin by asking whether there is justification, other than a pious hope, for assuming the existence of mystical, inherent, natural, divinely endowed "rights," and examine briefly the nature and structure of those "rights" whose existence all of us acknowledge in some form.

Our ancestors, in their long and stubborn struggle to conserve their ancient liberties and to expand them, consistently referred to their established "rights and privileges." We might do well to assume that this phrase describes a likeness and not a difference. We may fairly base our definition of rights on the theory that they were and are privileges, granted to us at one time or another as the result of all kinds of pressures and forces, which—if justified in experience—become embedded for a short time or a long time in our fundamental law as rights. There is nothing sacred or inherent in this conception or definition of rights. They are

based on bargains brought about by conditions which were intolerable without regulations and concessions.

Many rights and privileges have been granted which turned out to be valueless or vicious. *Le Droit du Seigneur* has been relinquished for various reasons. The Divine Right of Kings, the principle of the rightness of autocracy, was at last extinguished to the accompaniment of much suffering and bloodshed. The right to own chattel slaves was a right of incredible antiquity, dating back at least to the beginnings of recorded history. It persisted into modern, enlightened Anglo-Saxon civilization until almost yesterday. It was enshrined in law and statute until only eighty years ago. It was passionately defended by good and honorable men, willing to fight and die to protect its sanctity. Senators and clergymen, in all solemnity, described the "peculiar institution" of slavery as a fundamental right, approved by God and sanctioned by Holy Writ. This right was abolished in our country at the cost of four years of dreadful civil war.

Such instances show that rights come and go: they expand and contract; they are canceled by common consent or as the result of force; they are constantly being abridged by circumstance, or they expand through what seem to be logical accretions. This fact, alone, vitiates their claims as inalienable endowments by Providence.

At this point we may establish Principle No. 1 regarding human rights: *They are amendable, transitory, impermanent arrangements.* A certain set of conditions produces certain justifiable claims. These claims are admitted by society as valid and are embodied in law and enforced by public opinion. They become accepted as "rights." Conditions change and the claims appear to be invalid; the law is amended, and the established "rights" are abridged, modified, or canceled altogether. They are always and forever subject to amendment. I know of no exception whatsoever to this general rule or principle. The only quality of permanence enjoyed by a human right is its impermanence, actual or implicit.

Another general principle characterizes human rights. Consider the foremost claimant among them: the right to life, the right to live. The naked, newborn infant is in no position to make good his claim to this proud privilege. If left alone for a few hours, he dies, and his little soul, immortal or not, his little puff of energy, flutters away—to what end or purpose we do not know. Someone, therefore, assumes the obligation of keeping him alive. Someone pays the bills which his existence entails. Someone or some people fight and pay for his

food, his health, his training, his clothing, his education. In other words people *pay* for the *right* to keep children alive. If this right were not paid for, it would cease to be.

Society has not always granted even this right. In a community living always on the edge of starvation, public opinion has justified the "exposure" of infants, particularly of infant girls. The right to bear and bring up children was, under those conditions, sharply curtailed. On the other hand, in more prosperous communities the rights of parenthood are forever expanding. Parents nowadays demand as a right that, when they are unable themselves to provide proper facilities, the public shall give vacations and prenatal care to expectant mothers; that babies shall be delivered in free hospitals, their health attended to by physicians and nurses supported at public expense, their education assured by a system of free schools, and so on. These increased rights are acquiesced in by the public as in line with enlightened public policy, but let no one assume that they are inherent rights. They are privileges, granted by the public and paid for by the public because the public believes it is well to make such payment for the public good and the future of mankind.

Here we may formulate the second universal characteristic of all human rights: Principle No. 2, *Someone always pays for them.* They are not inherent; they are bought and paid for, by someone, somewhere, sometime. *Always!* To buy a right —that is, to establish its valid claim—may require payment in the form of a war or a revolution. It may have been decided ages ago, but if so, it was at the expense and sacrifice of somebody or some group. And, because of such sacrifice, as Clough wrote:

> Young children gather as their own
> The harvest that the dead had sown.

The right to own private property is an ancient right, but it took thousands of years—and how many lives!—to establish that right and make it good. It is not clear-cut today. There are barbarous tribes which still own all things in common. The communists would revert to that primitive practice and establish the title of the state to all property—*at the expense* of everyone who owns private property. Even under capitalism the right to own property is subject to many qualifications. Every measure of taxation is an interference by the state in the perfection of private ownership. The state says, "We shall have to take so much of your property every year to pay for implementing the rights of other people. This is not only good business for them, but for all of us, you included." How fairly and hon-

orably this is done depends on the character of the state, which, in theory, is you. The right of eminent domain is a direct denial of private property rights whenever the interests of the people as a whole seem to be involved. In that case, you are the Forgotten Man, but your predicament will serve to remind you that the right of eminent domain is no exception to the rule that, to maintain a right, somebody always pays.

If the "general relativity of rights" is demonstrated by their amendability and by the payment principle, which I have called Principles No. 1 and 2, it is further illustrated by Principle No. 3: *In all rights, the individual is nothing, the public everything.* Apparent inconsistencies with this rule will not bear the light of analysis and examination. This, in itself, would seem to invalidate the mystical endowment theory and, in fact, does so. As an individual you have no right or claim to anything. This is where our Bills of Rights become documents of confusion. Let us say you claim the right to a free education. You are utterly wrong. The world does not *owe* you an education or a living—contrary to the assumption which is gaining considerable acceptance in this country today. The public assumes that its future condition will be happier if you are literate than if you are not. Therefore it consents to pay the bills for your education. If the net result —as our Army tests indicate— is disappointing, the fault lies in the nature of the education provided or the human material involved, or both, not with the genial willingness of the public to provide you gratis with what you blithely assume to be your due, to throw away, ignore, or maltreat as you choose. Your descendants may safely assume that, if free education is ever admitted to be a complete failure, the right to it will vanish into thin air. An inexpedient right, or one whose exercise is contrary to the general welfare, simply ceases to exist. KEEP OUT will be placarded on Public School No. 3, and little Willy will turn back to the parental jungle for his instruction.

Neither union officials nor executive vice presidents are notorious students of abstract truth. Their concerns are with immediate and specific problems the merits of which I do not propose to discuss. But it is significant, wholly aside from questions of pay or conditions of labor, that both sides base their contentions on an abstract principle which they have not defined: in this instance the Right to Strike and its inevitable corollary, that involuntary labor is servitude.

Therefore *the one issue which must be met if there is to be any healthy and reasonable determination of these labor controversies is the valid interpretation of*

this abstract principle. The public cannot decide whether an 18½ cents per hour wage raise is desirable or a 19½ cents per hour raise is undesirable. It is quite unable to pass on the question of how much an industry shall earn or at what price a ton of steel shall be sold to manufacturers. Nor can it always—in moments of emergency—decide on the ethical merits of conflicting claims and positions or determine which party is at fault.

Was the New York tugboat strike of 1946 due to the greed of owners or of workers? Were the cattlemen who withheld beef from the market in 1946 in effect striking against the public for their own private advantages? When bankers elect to withhold credit, are they combining in a strike of capital? The public seldom has all the facts on which to base a decision as to the rights and wrongs of specific instances. On the other hand, public opinion becomes a determining factor when such a controversy clearly involves either the abuse or denial of a human right or the general principles underlying such a right, because it is the public itself which has granted that right in the first place and pays for its maintenance and proper exercise.

But, in so far as the major strikes or threatened strikes of 1946 have been strikes against the public rather than strikes against private ownership and management, they have served indirectly to clarify the general issue. They have created or confirmed the belief that strikes "against the public" which affect the necessities of living are intolerable. The public pays for the right to strike, according to Principle No. 2, but it cannot be asked to pay to the extent of its own great injury or destruction. It will not put private benefit above public good. To ask the public to permit a group of disputants to cut the public's throat is to approve anarchy as a normal process.

Our common purpose in living and working together is, I suppose, to achieve a kind of civilization which permits a maxi-

mum amount of fairness and equality of opportunity, a maximum of compassion toward the handicapped, and a hope of reasonable happiness for all. This is an immensely complex and intricate business; it involves all manner of concessions, of give-and-take; it involves injustices and their rectifications, advantages and disadvantages which must be equalized. It is almost a miracle that it succeeds, here and there, in existing at all. An orderly city street where robbers and murderers dare not tread, where lights shine and houses are heated, where children walk in safety to school, where milkmen deliver milk and postmen deliver mail—this phenomenon, which we take for granted, represents a coördination and coöperation of human effort so widespread, an integration of divergent interest so involved as to stagger the imagination. *It is a condition possible only where private interests are subordinate to the public good.*

If certain members of society combine to dim and extinguish those lights; if, as a result of their action, houses are cold, children are at the mercy of the hoodlum and the thug, and enforced unemployment stalks the streets, those members of society have committed a crime against the civilization of which they are themselves a part. They have exercised a right which ceases to be a right and becomes an agent of anarchy.

Not only labor leaders and members of militant unions, not only the writers for *PM* and the *Daily Worker*, but all men everywhere, owners of property, white-collar workers, managers of businesses, all of us, must think more clearly before we invoke our particular rights or prate about human rights in general. Let us consider always what the unlimited applications of an individual right may involve before we push our argument to the brutal absurdity of an attack on society in general.

Right of Counsel to Shed Tears

Counsel in arguing a case to the jury have the right to shed tears, and if they have them at their command it may be their professional duty to shed them. Ferguson v. Moore, 98 Tenn 342, 39 SW Rep 341.

A Good Award

"The very definition of a good award is that it gives dissatisfaction to both parties." Goodman v. Sayers, 2 Jac. & W. per Plumer, M.R.

BIG DEAL

By FLORENCE KRUG

UP TO now, we've been sort of coasting along, waiting for something to happen. We've been hoping for the best, but counting back the weeks that Jim has been home and a member of the 52–20 Club, has made us a little afraid. He doesn't beef much, but I do! Even if I did hang onto our two and a half rooms against all odds for almost two years for strictly sentimental reasons, I can let him think I was a smart gal and foresaw the housing shortage can't I? But why the devil didn't I foresee the office space shortage and find him an office to come home to, and foresee the client shortage and arrange for some of my friends to get trampled on by gazelles?

And now this! With all the legitimate complaints I have, I guess I could tell you a better one, but this is funny. When you lose your sense of humor, it's time to die, so to the accompaniment of the dripping of my life's blood, let me tell you this thing that happened to us.

It began with a solid fact! We got a client! It wasn't much, understand, but it would have been good for Jim because he would have put his hand in. We decided to blow the fee in on Corona-Coronas and apple brandy. I was going to be magnanimous and share the brandy without taking my cut in cigars. Big-hearted Florrie, they call me! And that especially since it was my very own mother who snagged the client.

It seemed that the son of a very close and dear friend of Mama's wanted his name changed and when Mama heard of this she said:

"Oh, my Florrie's Jim is home from the Army and you know he's a very fine, top-notch lawyer and he will be able to handle this thing for your son."

So before we turned around, Jim was getting out his legal cap and I was cleaning the type on my portable and we were in business. I knew the whole deal wasn't worth more than about $25 and I knew that although Jim was the soul of courtesy and consideration with any office staff he ever had, when I'm the hired help I take a beating; but it was good for him to be lawyering so I decided to take it. Not having any choice, I think it was a wise decision. And anyway, this too shall pass and I tasted that apple brandy rolling on my tongue.

Jim's voice went down one octave and by the time he sat down to call his client, it was down to lawyer level. I was sitting right next to him with my notebook

and a pencil I sharpened with my best vegetable knife and when he got the information he repeated it, and I wrote it down in my little book.

Such beautiful "Wherefore's" never graced a notebook. First we did the petition and then the Order and then the affidavits and although it's very easy to enumerate them now, I am here to testify that we sweated. It had to be just right! With Jim, everything must be perfect, always. It took him half the night to dictate to me and when it came time for me to read it back to him, it took me the rest of the night to figure out what I had written so confidently.

Finally, after typing away what seemed like the best years of my life, everything was ready. We had to go out for dinner that night and I felt so good I wanted peacock's tongues on waterlilies, but as usual I settled for hamburgers. The hemlock cup would have been their perfect companion. Still, the evening wasn't wasted because on the way out we mailed the papers, and it didn't take two days and they were back, all signed, witnessed, notarized and in order.

Innocent child that I was, I thought I was through. The rest was up to Jim. He went through the required motions and everything went smoothly. Now there was a thirty day wait until the law took its course, but we are essentially decent and honest and patient people, and we went on with our normal occupations of looking for office space and/or clients; talking about the V.A., the O.P.A., the U.N., and all the things that were important to us before we got a client; and I got me a job to bolster that twenty per and our fast dwindling reserve.

Came the day! My mother's friend's son Martinenko officially became Martin. And we realized that although we had talked money between ourselves, we had never mentioned the matter to Mother or Mother's friend or Mother's friend's son, lately Martinenko and now Martin. With a sinking feeling we realized that Max D. Steuer probably collected his fees in advance or certainly had iron-clad contracts, and it looked like we were going to learn the hard way. I trembled to think that I had inherited my good nature from Mama.

However, she's my mother, and so I was the one to call her from my office and hear her shocked and hurt voice tell me that no son-in-law of hers was going to collect a fee from her friend and it was with the greatest pride that she offered Jim's services. I would have been happier on my way to the salt mines in Siberia than on that subway ride home.

The new Mr. Martin, innocent of all knowledge of the family upheaval he had caused, came to visit us that night to pay Jim for the disbursements he had made.

What's more, he brought his wife with him, and there we were with a social evening on our hands. We felt about as sociable as polecats. Still, this was no time to lose our tempers and so we sat and we sat and she told me about how well her maid cleans and how she is simply mad about her new beige suit, and didn't I think a few mink skins would just make the outfit complete? Brother, if I could have told her what I thought!

With the grace and alacrity of a woman going to the gallows, I went on K.P. at about 9:30 p.m., hoping that this hollow mockery of an evening at home with friends would come to an end with the last sip of coffee. It did and I will forever thank God for small favors.

When Mrs. Martin finished telling us how skilfully she managed her household, Mr. M. finally asked Jim for an accounting on his disbursements and I was surprised when Jim said $21.00 even, because we had figured it our earlier in the evening and it only came to $20.80. How could he, this man to whom I was tied for life, this man of integrity and pride, practically steal 20¢ from his first, only, and nonprofitable client? Twenty cents! This way lies madness and Sing Sing!

During the customary five minutes of silence to give our guests time to get to the elevator, we glared at each other. Jim erupted first and amazed me with the information that our first venture into the legal world had cost us $2.25 in actual cash, because that was what our clients had eaten in ham, cheese, crackers, sugar, cream and coffee. Before I could answer him, he stalked out, and Jim is not the stalking kind. I would have loved to stalk too, but I had no place to go, so I stalked into the kitchen and washed the dishes, and at the same 75¢ an hour that Mrs. Martin pays her maid, that $2.25 went up to $2.62½.

I was mad at my mother and mad at the Martins and mad at Jim and mad at myself and it's just a lucky thing that I didn't crack the silex again, because if I had there is no telling what the consequences would have been.

When Jim came back half an hour later, I knew the score. One look at his face and I knew that all was well again. He had a White Owl in his right hand and a paper container of chocolate soda in his left. He was pleased and smug that he had kept his promise to himself and to me to turn his first fee into cigars and a drink. We sat down and he smoked and I sipped and rolled the chocolate soda around on my tongue and we laughed at ourselves and the world.

Only now I know for sure that one more case like this and we must go broke.

◆ Condensed from Chicago Bar Record, December, 1946

The Lawyer's Advice to His Client Concerning the Family Business

By
THOMAS H. BEACOM

MY interest in the closely held family business is not newly acquired. It first took root in 1915 when I spent a summer trucking flour in an Oklahoma mill that belonged to my brother-in-law. It flowered in 1931 when I was brought back to Chicago from the wheat fields of Kansas and instructed to nose into every family business my employer had in trust.

We have had them as executor, as administrator, as conservator, as trustee, and sometimes as guardian.

We have had them with broad powers and no powers, with good, bad, and indifferent management, with a good future and a horrible past, and vice versa.

We have had them as sole proprietorships, as partnerships, and as corporations. We have had controlling stock and minority stock. We have had beneficiaries who knew more than we did about the business, some who only thought they did, a few who did not know as much, and one or two where nobody seemed to know anything. We have had a malt company that survived prohibition, and a soda fountain manufacturing company that did not. We have had various and sundry combinations of all the factors mentioned. Because of the almost infinite variety of enterprises, powers, and persons, is it any wonder that a blanket rule is difficult to devise? The one obvious thing about these problems is that one should not be dogmatic in announcing solutions, and yet there is temptation to state the answers with finality after a few experiences.

There is sometimes an impression that an executor or administrator has inherent power to continue and carry on a trade or business, whether incorporated or not, which has been owned and operated by the decedent. This is wrong, for if there is one thing upon which the courts are agreed in connection with the settlement of estates it is that an executor or administrator has no authority by virtue of his official position to continue the conduct

of a business belonging to the estate. His duty is to settle the affairs of the estate without unnecessary delay. He is not expected to launch out in commercial enterprise with the assets of the estate. Authority to continue the business may, of course, be given in the will. In some states the authority is granted by statute. Without authority from one of these sources, an executor or administrator has power only to carry on the business so long as is necessary to wind it up.

If power to continue a business is granted by will the language of the grant must be explicit and the intention of the testator be clearly expressed. Frequently difficulties arise from failure of the draftsman to anticipate ordinary business problems, and often from failure to identify even the business itself explicitly. For example, a testator in Colorado left his business in general terms to his son and the remainder of the estate to the widow. The testator carried on a manufacturing enterprise as sole proprietor, in a building and on land held in his own name. A definition of the word "business" was necessary. Quite readily it was agreed that tools and machinery, inventory and accounts belonged to the business and hence to the son. With respect to cash and real estate, opinion of those beneficially interested was divided; the decedent had drawn business cash indiscriminately for business purposes and personal use; the business could have been but had not been conducted on rented ground. It was finally concluded that the cash and land went to the son as a part of the business; but it should never have been necessary for a court to decide the question.

As to whether authorization to continue a business, granted by will, passes upon death or removal of the executor, to a successor, there is a conflict of authority. General rules of will interpretation are applied and the answers usually turn on what the courts find with respect to the necessary or implied intention of the testator.

Clauses requiring the executor, in conducting the testator's business, to employ a certain person have been generally held invalid. The reason is that an executor is not required to expose himself to personal liability for the acts of some person not of his selection. Whether this would be the rule in the case of corporation where a designated person could be employed in a position subjecting neither the corporation nor the executor to liability, seems still to be an open question. Incidentally, most of the law concerning the power of a legal representative to conduct a business appears to have grown out of litigation involving sole proprietorships and partnerships. Nevertheless, where decisions involving corporations

have been handed down, the rule has been strict; not long ago in New York the courts held an inactive co-executor personally liable for loss. There the widow of the testator was executrix and became president of a corporation owned by the decedent at the time of his death. Her co-executor acquiesced in the arrangement but did not participate actively in the management of the business. There was no power given the executors by the will to continue operation of the business and when it became insolvent, the court surcharged them for the amount lost and at the same time reminded the co-executor that it was his duty to insist that the business be sold or liquidated as soon as reasonably possible.

The executor or administrator who continues a decedent's business without authority of law or will is looking for trouble. In many cases the legal representative has been held accountable for losses sustained even though he acted in good faith and was not guilty even of poor judgment. On the other hand he will not be allowed to take the benefit of anything he may have made and though his entire management shows a profit he will still be liable for losses on particular transactions such as uncollectible debts. An executor may be merely a victim of misplaced confidence and yet be obliged to pay for the experience.

Authority to carry on a business whether conferred by will or otherwise, does not *entirely* absolve an executor or administrator from *all* liability. He is naturally liable for the results of his negligence; and by weight of authority, a fiduciary, though conducting a business pursuant to court order, a clause in the will, or other authority, is individually liable for any indebtedness incurred. It is true he is generally entitled to be indemnified by the estate but there are many uncertainties in this apparent protection.

In Florida, a bank acting as *administrator* continued the decedent's packing house business under statutory authority and under the protection of a court order, but was held liable for debts incurred in the conduct of the business and suffered severe loss merely because it could not be made *positively* to appear that the business was carried on *exactly* as required by the statutes. The court there said: "An executor is not bound to carry on the trade or business of a deceased person although *directed* by will or *empowered* by statute to do so, but if he does elect to carry it on he incurs the hazards incident thereto. The contracts of the business are his personal contracts and although directed by him as executor or representative, they bind him individually and not the estate which he represents."

The controlling authority of the reasoning in this case might

be questioned if we knew more of the distinguishing facts on which the decision was based. The moral for us to draw is that in any event there is real danger of personal liability on the part of an administrator or executor, and real danger that he may not be able to indemnify himself out of the other assets of the estate; the general conclusion is that assets not a part of the business at death cannot be subjected to the risks of trade in the ordinary case.

The first duty of a fiduciary, upon acquiring *stock* in a family business that is incorporated, is to find out what powers and rights go with it. Ownership of controlling shares may simplify or complicate the task of estate administration. Operations will be simplified if by tact and intelligence the executor or trustee is able to enlist the whole-hearted coöperation of competent management. The job will be made complex if there are deficiencies in the instrument of trust, in the personnel of the business organization or in the resources and resourcefulness of the fiduciary. When those conditions prevail the fiduciary might be better off with a minority interest, representing less responsibility.

As an illustration of a common difficulty, consider the simple question of proxy voting. This may seem relatively unimportant. Since many wills omit entirely any clause concerning proxies, it is evident there are many attorneys who consider it a matter of no consequence. Yet the question may be quite important to the corporate fiduciary. The corporation cannot act except through a human representative. Some banks in their own by-laws provide that stocks held in trust under an instrument silent as to proxies can be voted by a person who is not an officer or director of the bank only if the proxy shows on its face how the holder shall cast his vote. A customer cannot be expected to know that. Nor an outside lawyer. Nor the company that calls the meeting. If the customer were aware of the restriction, he would probably do something about it. He would at least make certain that the trust instrument itself contained a plain statement of his own intent. He should be told about such rules. Unfortunately, we all know the opportunity is not always given the prospective Executor or Trustee to review wills before they are signed, and for that reason the corporate fiduciary, if thus restricted by its by-laws, does not always have a chance to say so.

One will that came to us illustrates another very practical proxy problem. Three *company employees* were named to act as advisors of the trustee. The will directed the bank to "vote and otherwise deal with" the stock of a designated company as the bank and any two of the advisors might agree. It seems never to

have occurred to the testator or his attorney that on some questions touching the intimate lives of the employees, for example, salaries, no two of the advisors could be expected ever to agree with the corporate trustee or with each other. Use of the phrase "otherwise deal with" certainly did not contribute any clarity to the situation. The net effect was that the trustee was stymied whenever any effective action was wanted. There was disagreement about the personnel of the board; there were differences over titles and pay; there were irreconcilable ambitions on the part of each of the three advisors to serve as president. We got out of that business by selling it to the employees.

Until now I have, rather aimlessly, chased the family business around the stump without bumping into any categorical imperative about what a lawyer's advice to his client ought to be. To be quite honest about it, I don't know. But I have to say something on that score to complete my assignment. Will you, therefore, give me license

"If you ask me our opponent intends to play upon sympathy . . ."

BY ALBERT J. SMITH, NEW YORK CITY.

to sum up some of the *negative* convictions I have acquired over the years?—knowing that among all the "don'ts" you don't have to agree with any. I call these the Ten un-Commandments:

(1) Don't assume that you know what property a man owns until he has told you at least once.

(2) Don't forget to find out what persons are to benefit from the estate and then, when you know, express their benefits in terms of percentages rather than dollars, as percentages will remain constant while dollars may not.

(3) Don't worry too much about taxes after you figure out how much they would be if the property owner died immediately, with his plan in effect. The only way to be sure of taxes as you figure them is to adjourn the legislature, close the markets, read the advance reports, have the deed or will executed, and then shoot your man, all in one operation.

(4) Don't use too much imagination in figuring what *may* happen and don't imagine that you can think of everything that *could* happen, but don't leave anything important to the imagination of the one who has to handle the estate. To paraphrase the philosophers,—in essentials be specific, in non-essentials be liberal, and in every word be clear. Then don't forget that future investments come under the head of non-essentials so far as the dead are concerned. So far as the survivors are concerned, good investments are indispensables. As they are interested parties they will be specific about their wants—therefore you can afford to be generously general in conferring powers.

(5) Don't tell a man to name his wife executrix and a bank trustee, especially if there is a business involved. That means an interval of at least a year in which the business may become so involved the trustee cannot accept it. It is false economy and ordinarily a great burden; it is often a grevious mistake.

(6) Don't use the word business as loosely in an important legal document as we just used it in our last negative rule and as our Statutes use it. If a man owning real estate uses it as a place to transact in his own name a manufacturing business and then dies leaving his real estate to the widow and his business to his son, there may be question as to whether the realty is an essential adjunct of the factory work which the man called his business and as such, a part of the son's inheritance.

(7) Don't allow a man to say in his will that a certain thing, for example, controlling stock in a close corporation, must be sold within a given period of time or for a stated price or upon such and such terms. Occasionally it is advisable to be definite on such provisions but not often. If nec-

essary to specify buyer, price and such things, let the owner do so by collateral instructions rather than tie his representative's hands with restrictions that all the world, including the potential buyers may read in the public probate records. To the objection that collateral instructions are not legal or not binding, let it be answered that executors and trustees are bound by conscience as much as by law. If a man cannot believe his representative has a conscience, then he had best die taxed without representation.

(8) Don't make large sums of insurance money payable to a corporation when there is a trustee designated to sell the controlling stock in the corporation or to liquidate the business. This is one case where taxes are of sufficient consequence to warrant adoption of another plan. Better results ordinarily may be achieved by making the insurance payable to a trustee under an arrangement that keeps the money from going direct to the corporation.

(9) Don't assume that a mercantile establishment or factory will run itself after the death of the majority owner; it is advisable to have the owner disclose the financial condition of his business enterprise to the trustee when the estate plan is made, as otherwise there may be deficiencies in the instrument of trust, contradictory advice from survivors, refinancing problems, and a multitude of internal rivalries interfering with the primary duties of the trustee.

(10) Don't conclude that estate planning consists merely of estimating taxes, obtaining an insurance policy to cover, seeing a will or trust agreement executed. If an estate is to be intelligently planned, the advisor should live with it, think about it, dream about it, work at it, to the exclusion of all other matters, until finally there are no questions left unanswered. Then, when that is accomplished, submit the whole arrangement to an informed associate in an effort to learn the questions you have forgotten. Finally, after two or three months, when the problem is stale, attack it again to see how incompetently you analyzed it the first time. After that you have only to wait to see how the plan works.

Should the Trial Judge Assist Counsel to Establish a Prima Facie Case?

By WM. B. RUBIN, of the Milwaukee Bar

THE January-February Case and Comment contains on page 61 an article under the foregoing caption in which its author concluded that the answer should be "Yes." I say the answer should be "No!" Here are some of my reasons:

I have been and still am in the active trial practice of the law for over fifty years. Through my office have passed more than fifty lawyers who acquired experience in trial work. Before law schools were the vogue, those who passed the bar examinations knew something about practice, which they acquired in law offices, but very little, if anything, about the theory of law. Law schools turn out attorneys who are filled with the theory of law but know little of pleading and practice.

I have held, and still do, to the notion that no attorney should attempt to try a lawsuit who is without experience in trial work; he should go through an interneship similar to that of the present day doctor. For the first five years of my practice I never drew a pleading nor tried a case without counsel. This taught me the art of pleading, gave me court experience, gave me confidence, and enabled me to fulfill my obligation to my clients.

Anyone who does not know enough to prove a prima facie case should not attempt to try a case alone any more than a neophyte doctor, just out of medical college, should perform an appendectomy without competent aid and supervision. Such attempts are hazardous. The after effects take their toll even though the patient may survive the operation.

Some twenty-five years ago I had the sad experience of being the attorney for defense in a civil action in which the attorney on the other side without counsel tried his first case. The judge, realizing the disparity in our experience, undertook to assist the young attorney in proving his "prima facie" case. He became so solicitous on his behalf that the jury got the impression that the defense was all wrong and the plaintiff should win. A miscarriage of justice followed.

The young attorney became so inflated with his victory that he publicly paraded his success. Without attempting to season himself, he entered upon other trials all alone with the expected disastrous results that even-

tually followed. He has since quit the active practice of law. He never was a trial lawyer. Had he apprenticed himself to an experienced attorney or had he employed experienced counsel in the trial of his case, the one case that resulted in a miscarriage of justice to this writer's client might have spared the young man's other clients from losses. I maintain that the judge should have at once sensed that the inexperienced attorney was unprepared and unfit to cope alone with the lawsuit, and should have advised him to get experienced counsel.

In order for a doctor to gain experience, is there any need for him butchering patients? Acting as assistant for a suitable time would leave many a grave undug. A young lawyer without experience who attempts to try a case by himself runs many risks. I realize that a judge is unlike an umpire in an athletic contest. On the other hand, for a judge to assist an inexperienced attorney may sensitize the jury into an unmerited verdict. The judge should not comment on the evidence; neither should he by any act or conduct of his lead a jury to infer which way the verdict should go.

The proper way to teach a young lawyer how to prove up a prima facie case is not to let him take chances of receiving judicial help in the courtroom at the risk of loss to his client and embarrassment all around, but, as I maintain, the judge shall direct the young attorney to employ competent counsel.

There is a time and place for experimenting in the practice, but not in the courtroom. If the young attorney is bold enough to accept a retainer, he should be honest with his client and advise him of the need of counsel. Strong nerves are an asset to a trial attorney but are not a substitute for experience. Trusting clients with good causes have too often been the losers because the inadequacy of their counsel—losses that proved themselves beyond retrieve even by a helpful judge. A conscientious lawyer should never permit his inexperience to be a factor for a possible miscarriage of justice. It is never, in the long run, advantageous to lean on an assisting judge.

Error in opinion may be tolerated where reason is left free to combat it.

—*Thomas Jefferson*

The house of every one is to him as his castle and fortress, as well for his defense against injury and violence as for his repose.

—*Sir Edward Coke*

Accident Prevention *vs.* Accident Cause

By MAXWELL HALSEY

Executive Secretary, Michigan State Safety Commission

Condensed from Journal of Criminal Law and Criminology, January-February, 1946

THE traffic accident handwriting is now on the wall. Successive nation-wide traffic death increases in 1945 clearly establish the trend. Up 30 per cent in August, up 40 per cent in September and up 53 per cent in October. The police profession now has its back to the wall. If it holds the line it is certain to get the credit. If it loses the fight it may get the blame.

In order to evaluate the current situation and make administrative decisions it is first necessary to establish a basis or foundation upon which plans and programs may be built. To do this it is necessary to clearly visualize what controls the level of accidents.

The following premises are suggested: (This assumes that in a general way the individual human being who is a driver will not by himself change very much from year to year in his attitudes, his desires, and his normal ability to make mistakes. Thus the human factor is assumed to be a constant which is moved in one direction by one set of factors and in the opposite direction by another set of factors.)

I. The level of accidents will always be a balance between the pressure of things that cause accidents and the pressure of accident prevention efforts.

II. If accident prevention efforts are increased and the accident causes remain constant then accidents will be reduced.

III. If accident causes increase and accident prevention efforts remain the same then accidents will increase.

IV. If accident causes increase and accident prevention efforts increase (both in the same amount) then the volume of accidents will remain the same.

V. The amount that accidents increase or decrease will depend upon the amount of increased pres-

sure applied by prevention efforts or by accident causing pressure.

VI. There may be a time lag in the accident increasing effect of more gasoline and there may also be a time lag in the accident decreasing effect of an accident prevention program.

Increase in traffic volume will produce such things as the following:

(1) At a relatively light intersection, an approaching car is more apt to have a car unexpectedly come out from a side street.

(2) At a relatively heavy intersection a given traffic situation may contain eight cars instead of four and thus be more complicated.

(3) On a given street there will be more traffic and hence the necessity of more passing with its attendant hazard.

(4) A mile driven for pleasure is apt to be more dangerous than a mile driven for business due to a difference in attitude. Available gas is apt to be used first for business and what is left over will be used for pleasure. As more gas becomes available there may be a proportionally greater increase in pleasure driving.

(5) Low mileage drivers will now drive more and reach out farther from their garages. They will not be as safe as a "C" book driver who has been driving relatively high mileage. These less safe miles of travel will create more critical traffic situations where an error in judgment may produce an accident.

Accident causing pressure is now definitely being increased through the release of more gasoline. Therefore, whether we get an increase in accidents, and how much, will be determined specifically by just how much we are able to increase accident prevention efforts.

The individual driver is exposed to accident hazards as he drives and also is exposed to safety education-enforcement. How well he gets along depends upon which exposure is the greatest.

The fewer the vehicles the driver finds on the roadway the fewer traffic situations there will be in which he is forced to make a critical decision in which a mistake in judgment would produce an accident. The more vehicles the driver confronts the more traffic situations there will be for him to commit an error which will result in an accident.

The errors of the driver in these additional traffic situations can be influenced by safety education-enforcement in many ways such as the following:

(a) He can be made more safety conscious and thus enter critical traffic situations more carefully.

(b) He can be made to think more of safety and hence spot potentially hazardous traffic situations and stay out of them.

(c) He can be made to enter dangerous traffic situations more slowly and thus more easily get himself out of difficulty.

(d) He can be made to increase his observance of specific rules of the road with the result that he will have fewer accidents due to these causes.

The end product of an enforcement program is to sufficiently impress the individual offender to result in his changing his driving habits in the direction of safer driving. If this effect is produced then accidents will be reduced. If this effect is not produced then the efforts expended only result in public distaste for the police.

Thus it is important to try to figure out what the individual motorist thinks about each enforcement action and then to adjust these enforcement actions in such a manner as to cause the correct reaction on the part of the motorist.

(1) *All motorists resent being arrested:* It must be assumed that practically no human being enjoys being arrested. In all but extreme cases the motorist hypnotizes himself into thinking that he was right and that the officer was wrong. This may not be correct but it is a practical fact which must be recognized and accepted.

Because motorists resent being arrested and having to pay a fine it is absolutely imperative that the enforcement action must be supported by a strong educational program to explain *why*.

(2) *Few motorists know exactly what they did that was wrong—why it was wrong:* It is imperative that the enforcement be accompanied by an education action; namely, to tell the motorist exactly *what* he did that was wrong, *why* it was wrong and exactly *how* he should have driven. If done properly this may become a strong lever in helping to make the violator appreciate the fact that the arrest and fine were necessary.

(3) *Warnings will not be taken seriously unless there are enough fines to give substance to the warning:* A motorist may misinterpret a non-supported warning as a meeting with an officer in which he, the motorist, talked the officer out of arresting him.

Thus warnings must be made to be closely associated by the motorists with the arrests. This can only be achieved by an educational attack. This essential relationship may be strengthened by:

(a) Use of written warnings rather than verbal warnings.

(b) A follow-up file of warning cards which adds to the driver file and may become an added factor in converting a second or third warning ticket to an actual arrest and fine and in the suspension of a license.

(c) Spreading the word around about the numerical relationship between warnings and arrests.

(4) *The adult driver may not pay much attention to a general safety education program unless it is directly coupled with an action enforcement program:* It is with reluctance that the conclusion is reached that a general safety program is not effective when applied alone.

When a motorist reads in the newspaper, sees on a poster or leaflet that a particular driving act is dangerous he may not think much about it.

But if he reads all this and then is stopped, warned or arrested, or reads that a lot of other motorists have been apprehended, then it is believed that he will be considerably impressed by the combined attack.

If this line of reasoning is believed then it may be concluded that safety education for adult motorists should never be used unless coupled with a specific enforcement program on the same identical subject, and at the same identical time.

(5) *Ideal sequence of motorist reaction:* Whenever it is possible, then, the motorist should react as follows:

(a) He reads in the paper of accidents due to a particular driving act and that the police are going to launch a program to emphasize this act through warnings and arrests. He may not think too much about this but he will look harder for the officer and will subconsciously drive more safely.

(b) He reads in the paper about how many motorists have been stopped, warned and arrested. This will make him think seriously about the subject because he may figure that he may be stopped. He may drive more safely and he will be in a frame of mind to read posters and leaflets and have them impress him.

(c) He is stopped by an officer and warned. This will impress him because

he has read about it and knew that it might happen to him.

(d) He is stopped and arrested. He may not like it but he has read about the program and knows at least a little about it and is a little more open-minded about being sold on the rest of the reasons.

(e) He will be convinced that the accident situation is serious, that the police mean business, and with good reason, and he will drive more safely to stay out of accidents and to keep from being stopped again.

If this total approach can be arranged it might well increase the effect of present arrests so much that it could have a significant effect on accidents in as short a time as three months.

"Young man, do you realize you've got a record a mile long?"

—SUBMITTED BY T4 HANK SNIDER, FORT DIX, N. J.

The Will of Judge Darrouzet of Galveston

Kentucky State Bar Journal, Vol. 2, No. 4

"WHEN this Will shall have been probated, I will have discovered, if that is possible, the mysteries of this life. I shall know what is to come to those who follow me. I leave this earth satisfied and without fear of the future; insofar as I am concerned, death does not carry with it horror or damnation.

"To my mother: I desire to record my gratitude. She has been a boon companion; my father went out of this life when I was a boy of nine. She is entitled to all the credit for my success; she has always been cheering to me when things were dark and dreary; she has prayed and smiled, thereby making the way brighter. She was a wonderful mother.

"To my wife: My wife has been a marvelous pal, ready at any and all times to share with me prosperity or failure, always met me with a smile, cared for and honored me all the time. When the clouds were low, and conditions were bad, she prayed and smiled, and pointed to the beacon light of happiness. To her, I owe much; had it not been for her influence, loyalty, and devotion, I would have been an obscure person in this great world. She gave me courage, and I carried on.

"To my boys: I want them to always remember their mother, be truthful to her, respect her every wish; be kind and faithful, always go to her and consult her on all your efforts; be careful to never do anything, by word or deed, that will make her shed a tear. Trust her with all your secrets; do everything, big or little, that you think will make her happy; have faith in all that she does and says; pal with her and make her pal with you. The world is in front of you; you will make your own position in life; you will be measured by the attention you give your mother; people will admire you for your treatment of her—your mother, your daddy's pal. Let her eye be your eye, her prayers your prayers, her happiness your aim at all times; let her be your guiding

"Your Honor, — there appears to be something irregular about this case."

— Submitted by JULIUS A. SAWIKI, Hamtramck, Mich.

spirit. Live and act in such a way that your mother will always be proud of you.

"This world is a good world, and never be led astray by anyone who says it's a bad world. You will find all kinds of people, some better than others; but all men have some good in them, and you should so live that you will be a respected citizen. You will not be perfect; you cannot be perfect; but you can so live that your virtues, if any you have, will be paramount, and the people will respect you for them. Always respect womanhood, be honorable in all your dealings, be truthful in all your transactions, and above all else loyal to those with whom you are dealing. So live that you will never fear death or man; be courageous, and at the same time human; always help those in want, and be faithful to every trust reposed in you, either by your mother, your friends, or those with whom you are dealing. Do not trust scandalmongers; never believe a story told to you about a friend, unless it is proved to be true, then try to defend the friend; find out why, but never quit a friend; stay with him, try to help him out. I do not mean by this that you should get into trouble by doing so, but do every honorable act to help him out. You are not 'your brother's keeper,' but you owe a helping hand to all, especially to those who have been friendly and kind to you.

"I owe the world a debt. Folks have been good to me. All I can say is that I have been on the square, fought the fight when I thought it was right to do so. I may at some time hurt the feelings of some people. I trust they have forgotten it; I never held a grudge in my life. To the world and its people, I entrust my boys, and I hope that they will be as good to the boys as they have been to me; and I trust that they will make as good citizens as there are anywhere."

Among the New Decisions

Arbitration — *specific performance as affected by provision for.* Circuit Judge Swan, of the United States Circuit Court of Appeals, Second Circuit, wrote the opinion in Texas Co. v. Z. & M. Independent Oil Co., 156 F2d 862, 167 ALR 719, holding that the rule that a contract of sale providing that the price be determined by arbitrators cannot be specifically enforced is subject to an exception where the stipulation for appraisal is not a condition nor the essence of an agreement but only subsidiary or auxiliary to its main purpose and scope, and when the parties may not be placed or left in statu quo by a refusal to enforce the contract, the chancellor may himself determine the purchase price or leave its determination to a master.

The rule and its exceptions are given in the annotation on "Specific performance of contract or option as affected by unexecuted provision for determination of price by arbitrators or appraisers" in 167 ALR 727.

Automobile Insurance — *insurer's assumption of defense.* In Helm v. Inter-Insurance Exchange, — Mo —, 167 ALR 238, 192 SW2d 417, opinion by Judge Tipton, it was held that an automobile liability insurer obligated to defend actions against the named insured or members of his family is not liable in tort for withdrawing, with leave of the court, from the defense of an action during trial, immediately upon discovering that the claim in suit was not within the coverage of the policy.

The annotation in 167 ALR 243 discusses "Liability of insurer based upon its act of withdrawal after assumption of defense."

Breach of Promise — *validity of statute abolishing action for.* Judge Stone in Heck v. Schupp, 394 Ill 296, 167 ALR 232, 68 NE 2d 464, wrote the opinion holding that a statute prohibiting the

bringing of actions for alienation of affections, criminal conversation, or breach of contract to marry violates a constitutional provision that every person ought to find a certain remedy in the laws for all injuries and and wrongs which he may receive in his person, property, or reputation.

Supplementing an earlier treatment in the series the annotation in 167 ALR 235 discusses "Constitutionality, construction, and application of statutes abolishing civil actions for alienation of affections, criminal conversation, seduction, and breach of promise to marry." Other cases have taken a different view.

Contempt — *appointment of receiver.* In Ritholz v. Dodge, — Ark —, 167 ALR 705, 196 SW 2d 479, opinion by Justice Millwee, it was held that in contempt proceedings against a nonresident not physically within the court's jurisdiction, a receiver may be appointed of the property within the state belonging to such nonresident as security for the payment of such fine as may be imposed.

The annotation in 167 ALR 713 discusses "Seizure or impoundment of property in contempt cases."

Contracts — *specific performance where contract specifies satisfaction.* In Herzog v. Ross, — Mo —, 167 ALR 407, 196 SW2d 268, opinion by Tipton, J., it was held that a contract for the sale of real property is not unilateral, so as to be unenforceable by the purchaser, because of a provision conditioning the purchase on the house being termite-free, "purchaser to satisfy himself in this respect by" a date named.

The annotation in 167 ALR 411 discusses "Provision in contract for sale of real property which makes performance conditional upon purchaser's or third person's satisfaction with condition of property."

Corporations — *qualifying stock of director.* Chief Justice Loughran in Tooker v. Inter-County Title Guaranty & Mortgage Co., 295 NY 386, 167 ALR 385, 68 NE2d 179, wrote the opinion holding that an agreement with one acquiring bank stock in order to qualify himself for election as a director, obligating the transferor to repurchase the stock at its book value, not less than a stated amount, when and if the transferee should cease to be a director, is invalid as at variance with the policy of the statute making ownership of unencumbered stock in a certain amount necessary to qualify one to become and to continue as a bank director.

The annotation in 167 ALR 387 discusses "Validity of transfer or contract incident to transfer of corporate stock to qualify transferee as director or officer."

Criminal Law — *evidence of other sexual offenses.* An important criminal law question was decided in State v. Ferrand, — La —, 167 ALR 559, 27 So2d 174, opinion by Judge Fournet. It was held that on the trial of one charged with a sexual offense, including incest, carnal knowledge, adultery, fornication, and rape, evidence of previous acts or attempted acts of intercourse by the accused with the prosecutrix at a time not too far remote is relevant and admissible for corroborative purposes and to show a lustful disposition, notwithstanding such acts are of themselves crimes.

A thorough treatment of all the cases on this subject appears in 167 ALR 565 under the title "Admissibility, in prosecution for sexual offense, of evidence of other similar offenses."

Divorce — *order respecting temporary alimony as appealable.* In Book v. Book, 59 Wyo 423, 167 ALR 352, 141 P2d 546, opinion by Judge Riner, it was held that an order in a divorce suit denying a wife's motion for alimony and suit money is not an appealable order within a statute providing for a review of judgments rendered or final orders made, and defining a final order for the purpose of such statutory provision as "an order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment."

The annotation in 167 ALR 360 discusses "Order granting or refusing motion for temporary alimony or suit money in divorce action as appealable."

Dying Declarations — *weight.* In People v. Bartelini, 285 NY 433, 167 ALR 139, 35 NE2d 29, opinion by Judge Lewis, it was held that the evidentiary value of a dying declaration testified to by the detective who questioned the deceased shortly after he was shot, is weakened by the fact that according to such testimony the deceased said that he was shot by two persons, whom he named, when undisputed evidence of the only two witnesses near the scene of the shooting was that only one man confronted the deceased as he emerged from the store and that it was that one man, whom the witnesses were unable to identify, from whose hand the flash of gunfire was seen.

The annotation in 167 ALR 147 discusses "Weight and value of dying declarations as evidence."

Evidence — *memorandum of telephone conversation.* In the U.S. Circuit Court of Appeals for the Second Circuit, in United States v. Moran, 151 F2d 661, 167 ALR 403, opinion by Judge Swan, it was held that a memorandum of a telephone conversa-

tion had with the defendant by a bank employee who is not available as a witness at the trial, made by the employee as a routine record in the regular course of business and with no motivation to prepare for litigation, and produced from the bank's records, is admissible under the business entry statute (28 USC § 695) in a prosecution for conspiracy to defraud the United States and to commit other offenses.

The general question "Memorandum of telephone conversation as admissible in evidence" is discussed in 167 ALR 405.

Income Taxes — *doing business outside state.* In Irvine Co. v. McColgan, 26 Cal2d 160, 167 ALR 934, 157 P2d 847, opinion by Chief Justice Gibson, it was held that under a corporation franchise tax law imposing a franchise tax upon corporations measured by net income but providing that if the entire business of the corporation is not done within the state the tax shall be according to or measured by that portion of the income which is derived from business done within the state, a corporation transacting business within the state is entitled to an allocation of in-

"Maybe Justice IS blind, yer Honor, but these men AIN'T!!"

come for franchise tax purposes only when business is done outside the state by the corporation acting through its officers or agents.

The subject of the annotation in 167 ALR 943 is "What constitutes doing business, business done, or the like, outside the state for purposes of allocation of income under tax laws."

Income Taxes — *stock dividends.* In Long v. Commissioner of Internal Revenue, 155 F2d 847, 167 ALR 550, opinion by Circuit Judge Miller, it was held that it was a cash dividend paid on stock which had been issued as a stock dividend, to one who had purchased it from the original recipient, out of a capital surplus created by a reduction in the par value of the stock, is, for Federal income tax purposes, to be regarded as income and not as a nontaxable return of capital.

The late cases are discussed in the annotation in 167 ALR 554 supplementing the annotation on "Income tax in relation to stock dividends (including character of corporate distributions as stock dividends)."

Income Taxes — *when dividends taxable.* In Commissioner of Internal Revenue v. American Light & Traction Co., 156 F2d 398, 167 ALR 300, Circuit Judge Sparks, of the Seventh Circuit, wrote the opinion holding that a taxpayer reports income upon an accrual basis does not make a dividend payable at a future date to stockholders of record at an earlier date taxable to him in the year in which his identity as a stockholder entitled to the dividend is ascertained.

Supplementing an earlier discussion the annotation in 167 ALR 303 presents the later cases when dividends on corporate stock become taxable as income.

Inheritance Taxes — *possession at or after death.* In Commissioner of Internal Revenue v. Bayne, 155 F2d 475, 167 ALR 436, opinion by Circuit Judge Swan, it was held that the existence of a reversionary interest by implication of law in the creator of a trust to pay the net income to himself for life and on his death to pay the corpus in equal shares per stirpes to his then surviving children and the issue of any deceased, or, in default of children or issue, in equal shares per stirpes to his surviving brothers and sister and the issue of any deceased, is sufficient basis for inclusion for Federal estate tax purposes of the corpus of the trust in the estate of the grantor as the subject of a transfer "intended to take effect in possession or enjoyment at or after his death," although when the grantor died he was survived by two children, two brothers, six nephews and nieces and two grandnephews, and by reason of the fact that at the time of creating the trust he was only thirty-four years old, expecting the birth of a child,

had two brothers aged forty-three and thirty respectively, a sister aged thirty-three, and four nephews and nieces all under the age of twelve years, the possibility of reverter was so remote as not to have been within his actual contemplation.

An extensive annotation on the question, supplementing an earlier treatment, "When transfer deemed to take effect in possession or enjoyment at or after death within succession, estate, and inheritance tax laws" appears in 167 ALR 438.

Insurance — *date of coverage of reinstatement.* In Farrell v. National Accident & Health Insurance Co., — NJ —, 167 ALR 329, 47 A2d 1, opinion by the court, it was held that the receipt and retention by an insurer of an overdue premium on an accident and health policy does not, even though it is retroactively applied, operate to give coverage for the period during which it was lapsed where the policy provides that receipt of a defaulted premium shall reinstate the policy but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance, and such retroactive application is beneficial to the insured in saving him the issuance fee charged on a new policy and in giving him a greater coverage for the rest of the period covered by the premium than he would have received under a new policy under which he would be entitled to only one half the stipulated indemnity for any loss resulting from injuries sustained or sickness contracted prior to the payment of the premium required for the first three months' insurance.

The annotation in 167 ALR 333 discusses "Date at which coverage begins upon reinstatement, renewal, or revival of insurance policy after default."

Insurance — *recovery of insurance paid by mistake.* In Pilot Life Insurance Co. v. Cudd, 208 SC 6, 167 ALR 463, 36 SE2d 860, opinion by Taylor, J., it was held that an insurer is entitled to recover back money paid to the beneficiary of a life insurance policy where such payment was made in the mistaken belief, arrived at after exhausting available sources of information, that insured had lost his life as the result of enemy action.

See the extensive annotation in 167 ALR 470 on "Right of insurer to restitution of payments made under mistake."

Judgment — *effect of error as to validity of law.* In Commonwealth v. Jefferson County, 300 Ky 514, 167 ALR 512, 189 SW2d 604, opinion by Chief Justice Tilford, it was held that a judgment of a circuit court in a declaratory judgment proceeding instituted by the attorney general against the state commissioner of finance and all the counties affect-

"Why didn't you hit the office next door?"

BY JOE M. TERRELL, UNIVERSITY OF ALABAMA

ed to determine the constitutionality of an act requiring the payment to counties having a population of 75,000 or more of 25 per cent of the official fees collected therein and paid into the state treasury, adjudging that the act is constitutional, precludes the commonwealth and those in privity with it, under the doctrine of res judicata, from questioning the constitutionality of the act, although there was no appeal from the judgment.

The subject of the annotation in 167 ALR 517 is "Validity and effect of judgment based upon erroneous view as to constitutionality or validity of a statute or ordinance going to the merits."

Labor Unions — *regulating*

political contributions by. An important question was decided in Bowe v. Secretary of the Commonwealth of Massachusetts, — Mass —, 167 ALR 1447, 69 NE2d 115, opinion by Justice Lummus, holding that labor unions, like individuals, may without denial of constitutional right be curbed by a corrupt practices act and prevented from dumping immense sums of money into political campaigns.

The annotation in 167 ALR 1465 discusses "Constitutionality and construction of statutes respecting political contributions or other political activities by labor organizations."

Labor Unions — *regulation of soliciting.* An interesting constitutional question is presented in Re Porterfield, 28 Cal2d (Adv 102), 167 ALR 675, 168 P2d 706, opinion by Judge Schauer, holding that an ordinance requiring a license to solicit memberships in organizations requiring payment of dues which, by necessary implication, directs the licensing authorities to deny an application for a license unless satisfied that the applicant "will not resort to threat, menace, coercion, intimidation . . . in his proposed work of solicitation," as applied to an applicant for a license to solicit memberships in a labor organization, requires the applicant to prove that he and his organization will forgo their rights to engage in strikes, picketing, or boycotts, as a means of procuring members, and is void as in derogation of the applicant's constitutional right to carry on a lawful business or professional activity.

This interesting question is the subject of an annotation in 167 ALR 697, supplementing an earlier annotation on "Validity, construction, and application of statute or ordinance regarding solicitation of persons to join an organization or society or to pay membership fees or dues."

Licenses — *revocation for conviction.* In South Carolina State Board of Dental Examiners v. Breeland, — SC —, 167 ALR 221, 38 SE2d 644, opinion by Justice Oxner, it was held that the phrase "has been guilty of," in a statute which empowers a circuit judge to revoke or suspend the license of a dentist who "has been guilty of" any immoral or dishonorable conduct which would prevent the state dental board in its sense of honor from issuing a certificate of practice, does not require a trial de novo of the issue of guilty of an offense involving immoral conduct of which the licensee has been convicted, even in the case of one who has received a pardon.

The annotation in 167 ALR 228 discusses "Conviction as proof of grounds for revocation or suspension of license of physician, surgeon, or dentist, where conviction as such is not an independent cause."

Medical and Hospital Plans — *as insurance business.* In California Physicians' Service v. Garrison, 28 Cal2d (Adv 771), 167 ALR 306, 172 P2d 4, opinion by Edmonds, J., it was held that a nonprofit physicians' service corporation organized and maintained by physicians for the purpose of furnishing medical care on a voluntary low-cost basis to persons with small incomes, under a statute expressly providing for limited regulation of such organizations, which under its contracts or group agreements with its professional and its beneficiary members assumes no risk but acts merely as agent or distributor of funds created by monthly dues of the beneficiary members to which the physicians look solely for their compensation, and the principal object, purpose, and plan of operation of which is "service" rather than "indemnity," is not engaged in the insurance business within the meaning of the regulatory insurance laws and is not subject to the supervision of the insurance commissioner notwithstanding additional features of hospitalization and reimbursement for drugs, incidental to the plan or scheme as a whole.

The subject of the annotation in 167 ALR 322 is "Validity and nature of group medical and hospital service plans."

Nuisances — *newcomer's right to question existing.* In Hall v. Budde, 293 Ky 436, 167 ALR 1361, 169 SW2d 33, opinion by Justice Tilford, it was held that one acquiring property may require that neighboring property, notwithstanding its previous use, be utilized in such a way as not to interfere with the reasonable enjoyment of his property.

An interesting annotation on "'Coming to a nuisance' as a defense or operating as an estoppel" appears in 167 ALR 1364.

"Do you want me to read back what I've got here or what it ought to be?" By Albert J. Smith, New York City.

Private Crossing or Footpath — *railroad's duty at.* Judge Spalding wrote the opinion in McCarthy v. Boston & Maine Railroad, 319 Mass 470, 167 ALR 1250, 66 NE2d 561, holding that passive acquiescence by a railroad company in the public's use of a private crossing and its fail-

ure to take active measures to prevent such use do not render them invitees to whom the railroad owes a higher duty of care for their safety than it does to mere licensees or trespassers.

The annotation in 167 ALR 1253 discusses "Duty of railroad toward persons using private crossing or commonly used footpath over or along railroad tracks."

Real-estate Brokers — *who are.* In Andersen v. Johnson, — Utah —, 167 ALR 768, 160 P2d 725, opinion by Judge Turner, it was held that one who assists a licensed real-estate broker to procure listings of real estate for sale in consideration of a share in the commissions is not within a statute requiring the licensing of real-estate brokers or salesmen, defining the term "real-estate broker" as including persons who for another and for or in expectation of receiving a commission sell or list or offer or attempt or agree to list, or assist or direct in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate, defining the term "real-estate salesmen" as including any person employed or engaged by or on behalf of a licensed real-estate broker to do or deal in any act or transaction set out or comprehended by the definition of a real-estate broker, and providing that one act for compensation or valuable consideration shall constitute the person so acting a real-estate broker or real-estate salesman.

Supplementing an earlier annotation on the question "Who is real-estate agent, salesman, or broker within meaning of statute" see 167 ALR 774.

Release — *declaratory judgment as to.* In Zayatz v. Southern Railway Co., — Ala —, 167 ALR 426, 26 So2d 545, opinion by Justice Brown, it was held that the validity of a release from liability as affected by matters outside the instrument itself is a permissible subject for a declaratory judgment where the declaratory judgment statute provides that when a proceeding thereunder involves the determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

See the annotation in 167 ALR 433 on the question "Release as proper subject of action for declaratory judgment."

Res Ipsa Loquitur — *weight of proof.* A troublesome question was decided by the West Virginia Court in Holley v. Purity Baking Co., 167 ALR 648, 37 SE2d 729, opinion by Judge Riley. It was held that the doctrine of res ipsa loquitur does not require, but merely permits, a finding of negligence.

The conflicting views on this question will be found in 167 ALR 658, which supplements an earlier annotation.

Revival of Actions — *order granting or denying as appealable.* In Squire v. Guardian Trust Co., 147 Ohio St 1, 167 ALR 255, 68 NE2d 312, opinion by Judge Zimmerman, it was held that an order of revivor against the personal representative of a deceased defendant is not "an order affecting a substantial right" within a statutory provision that "an order affecting a substantial right in an action, when in effect it determines the action and prevents a judgment, or an order affecting a substantial right made in a special proceeding . . . is a final order which may be reviewed."

This very practical question is discussed in the annotation in 167 ALR 261.

Selective Service Act — *seniority employment rights.* In Fishgold v. Sullivan Drydock & Repair Corp., 328 US 275, 167 ALR 110, 90 L ed 1230, 66 S Ct 1105, opinion by Mr. Justice Douglas, the court held that the provisions of the Selective Training and Service Act of 1940 for the return of a discharged veteran to his former civilian employment without loss of seniority and with immunity from discharge therefrom without cause for a period of twelve months do not protect him from layoffs while nonveterans with higher seniority are continued at work.

A very interesting annotation on "Re-employment of discharged servicemen" appears in 167 ALR 124.

Small Claims Court — *right to be represented by attorney.* The small claims court act was upheld in Prudential Insurance Co. v. Small Claims Court, 76 Cal App2d (Adv 465), 167 ALR 820, 173 P2d 38, opinion by Justice Peters. It was held that exclusion of the right to appear by attorney in litigation in a small claims court does not involve a denial of due process where the parties have a right, by appealing, to a trial de novo in another court in which they may have the assistance of counsel.

See the annotation in 167 ALR 827 on "Statutory or constitutional provisions relating to participation by attorney or representative in small claims court."

States — *priority of on insolvency.* The New York Court of Appeals, opinion by Conway, J., in Re Gruner, 295 NY 510, 296 NY 668, 167 ALR 628, 68 NE2d 514, 69 NE2d 822, holds that the state's prerogative right to priority of payment of taxes out of the estate of an insolvent, being equitable in character, is subject to liens in existence at the time such right is sought to be enforced, and therefore will not take precedence of a claim of a pledgee of a seat in

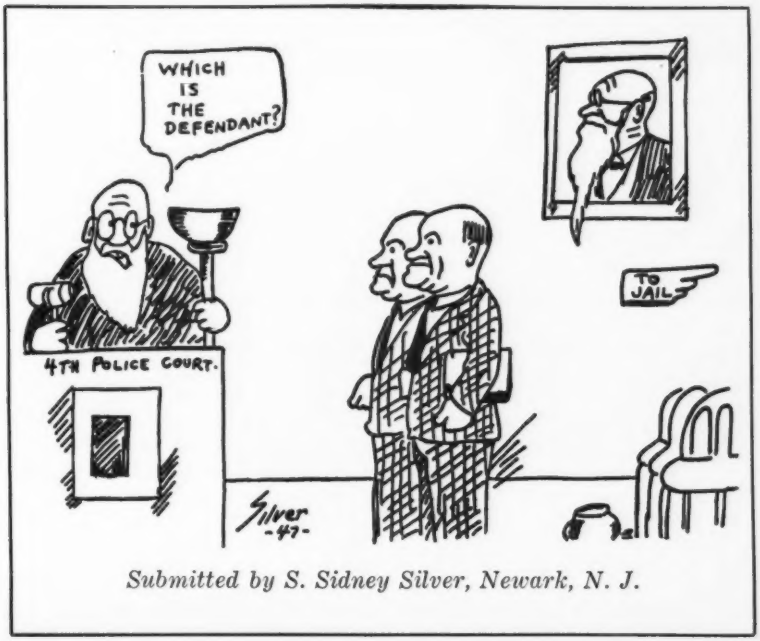
the New York Stock Exchange to the proceeds of its sale.

The conflicting views will be found treated in the annotation in 167 ALR 640 on "State's prerogative right of preference at common law" supplementing earlier annotations in A.L.R.

Stockholders — *action against third person.* In an opinion by Justice Carter in Sutter v. General Petroleum Corp., 28 Cal2d (Adv 539), 167 ALR 271, 170 P2d 898, it was held that misrepresentations concerning certain property whereby one was induced to form and invest in a corporation to acquire the property are actionable by him although such misrepresentations may also give rise to a cause of action on behalf of the corporation.

The annotation in 167 ALR 279 discusses "Stockholder's right to maintain (personal) action against third person as affected by corporation's right of action for the same wrong."

Strikes — *right to wages during layoff due to strike.* Justice Lummus wrote the opinion in

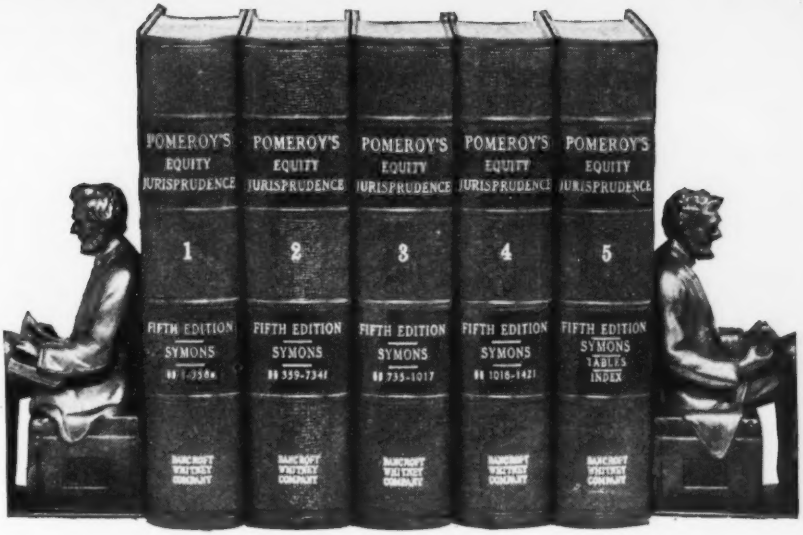


Submitted by S. Sidney Silver, Newark, N. J.

"Do you have something that will make a jury sympathetic?"

Members of Baker & Confectionery Workers v. Hall Baking Co., — Mass —, 167 ALR 986,. 69 NE2d 111. The case holds that employees of a bakery the output of which is sold by driver-salesmen are not entitled to wages during a layoff occasioned by a strike of the driver-salesmen, by virtue of a provision in a collective bargaining agreement that employees shall not "suffer loss of time or pay during the breakdown or interruption of service except when caused by conditions beyond human control," where the agreement gives the employer the right to lay off employees "because of slack work."

The annotation in 167 ALR 992 is on the question "Construction and application of provisions of collective bargaining agreement respecting loss of time or pay of employees in consequence



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of interruption or suspension of employers' business or operations."

Sublease — *tenancy at will.* In Anderson v. Ries, — Minn —, 167 ALR 1033, 24 NW2d 717, opinion by Justice Peterson, it was held that where a tenant at will subleases to a third person who takes possession under the sublease, the original lessor may at his option ignore the sublease altogether, treat it as valid as between the lessee and sublessee, or treat it as a disseisin terminating the tenancy at will.

The annotation in 167 ALR 1040 is on the question "Sublease or assignment of tenancy at will."

Telephones and Telegraphs — *mistake in price — measure of damage.* The case of Allen v. Western Union Telegraph Co., — SC —, 167 ALR 1392, 39 SE2d 257, opinion by Justice Oxner, holds that the measure of damages recoverable against a cable company by the recipient of a cablegram making an offer to sell which he accepted, for an error in transmission whereby a lower price than that intended by the sender was named, in consequence of which the recipient resold the goods before learning of the error, at a price lower than he otherwise would have asked, is, where the error in price did not deter him from purchasing, not the difference between the lower price named in the cablegram and the actual price, but the difference between the price at which he resold and the price at which he could and would have sold had the message been correctly transmitted.

The factual applications of this rule are discussed in 167 ALR 1398 under the title "Measure of damages in action against telegraph company based on error as to price in transmission of message."

Trusts — *expenses of unproductive property.* A difficult question of trust law is decided in Brookings v. Mississippi Valley Trust Co., — Mo —, 167 ALR 1424, 196 SW2d 775, opinion by Commissioner Bradley. It is there held that expenses of trust real estate which since the creation of the trust has become unproductive and which the trustee is without power to sell are chargeable, not against the corpus, but against the income derived from the trust property as a whole, where by the terms of the trust the trustee is directed to pay out of income all taxes, insurance, repairs, and other charges upon the property or any part thereof before distributing to the beneficiaries the "net income remaining."

See the annotation on this question in 167 ALR 1431.

Wills — *admissibility of declaration of legatee.* Justice Matson in Re Forsythe, 221 Minn 303, 167 ALR 1, 22 NW2d 19, held that evidence of declara-

tions by one of several legatees tending to cast doubt upon the decedent's testamentary capacity, while not ordinarily admissible in evidence unless such legatee has taken the stand to sustain the will, are admissible where such legatee has died as admissions against pecuniary interest if they related to a matter of which the legatee was personally cognizant and the legatee had no probable motive to falsify the facts.

An extensive annotation under the title "Admissibility of declaration by beneficiary named in will in support of claim of undue influence or lack of testamentary capacity" appears in 167 ALR 13.

"I've always expected something like this to happen with a mixed jury!"

The Jury Problem—A Dissent

By Attorney DALLAS SCARBOROUGH, Abilene, Texas

IN *Case and Comment*, January-February 1947, page 13, you published an article by Hon. Julius H. Miner, a Judge of the Circuit Court, Cook County, Illinois, in which he suggested that the Court should give an oral charge and should be permitted under the law to make such explanatory remarks that might be necessary or desirable to enlighten the jury; (b) the right of trial judges to comment upon the evidence; (c) giving the trial judge fuller control over his trials, and especially giving the trial judge disciplinary power over attorneys; (d) abolishing the unanimous verdict except in capital cases; (e) a school for jurors.

The right of trial by jury was secured by the people against the bosses and the overloads. Nobody but the common people have ever wanted or appreciated the trial by jury. Dealing with these subdivisions of His Honor's in the inverse order in which he gave his list:

(e) Where he wants to send the jurors to school for special jury service, he should remember that the school for jury service is the every-day experience of the average American citizen dealing with his fellow man, dealing with every problem that confronts the human race. That is the school in which jurors should be trained. Then when they get into the jury box some will know something about what is going on in the trial.

(d) I have never seen any reason why 9, 10, 11 jury verdicts would not be fair, and to that extent I am able to agree with His Honor.

(c) The trial courts now have all the power on earth they need, if they know how to exercise it. The lawyer should know his place and the judge should know his job. There is in reality no serious conflict. The judge and the lawyer each owe a mutual respect for the other and a failure on the part of the court is worse than a failure on the part of the lawyer because the court has the upper hand. With a very rare exception, the American judges are striving to administer justice; are striving to prevent any unfairness or undue advantage to be taken of anybody in their trials. The truth is that the American judge is doing well under the present set-up.

(b) Should the trial judge comment upon the weight of the testimony. The position that the trial judge occupies is such that his comment is tantamount to an instruction. If the court has a right to instruct a verdict, let him do it. If it is a jury question of fact, let the jury deter-

mine it. When you allow the trial judge to comment upon the weight of the evidence, you substitute the right of trial by judge for the right of trial by jury. If we are to have a jury, have it free and unhampered. What may seem to be the facts to the judge may not seem to be the facts to the jury. No, the trial judge does too much commenting now upon the weight of the evidence by his emphasis and his inflections which do not appear on the cold type of the record. Under our present system, the Federal Judges have the authority to comment upon the weight of the evidence. In my forty-two years of experience at the bar, it is seldom that I have ever heard a Federal Judge comment upon the weight of the evidence and in almost all instances where it has occurred I have always thought the Judge was wrong. A few Federal Judges feel that it is their duty to comment upon the weight of the testimony. I have heard one of our great trial Federal Judges say time and again that in almost all instances where he had submitted cases to a jury that the jury had reached the same conclusion that he would have reached had he been trying the facts, and that the jury were more apt to be correct where he had differed with them than he was. His procedure represents the true Judge. Why should a judge be permitted to comment upon the weight of the evidence? Does he know more about it than twelve good and lawful men who are called from the different walks of life? I don't know why he should. They know as much about the facts individually as the judge, and collectively they should know more.

(a) What His Honor really means in this subdivision is to give him authority to comment upon the weight of the evidence. Don't do that. Never do it.

Conclusion: This country is builded upon the law. We would never have had a democracy but for the lawyers of this country. Destroy the right of trial by jury and the constitutional guarantee of our civil rights and our civil liberties and you will have destroyed our democracy. There are a lot of folks in this country who would like to destroy our democracy and they are not all communists. We have more royalists in this country than we do communists and nobody seems to be afraid of them. However, there is no reason why they should be because they are hopelessly in the minority. All this bunk about un-American activities is a lot of imagination. The Army psychiatrists classed a very large per cent of our enlisted men below normal intellectually, but I don't believe they know what they are talking about. The soap-box politician we have always had and we will always have, but in the end you can always depend upon the intelligence of our people.

A View of the English Legal Profession

By BERNARD M. KAPLAN
of the Chicago Bar

• Condensed from Chicago Bar Record July, October, November, December, 1946, Issues

THE organization of the English legal profession differs quite radically from that of the Bar in the United States. In England, the counterpart of the American attorney consists of two distinct personalities, the solicitor and the barrister. Law firms in England consist entirely of solicitors, and, as such, are unknown among barristers who are forbidden by the ethics of the profession from entering into any form of professional partnership. One is either a barrister or a solicitor; one cannot be both at the same time. Though it is possible for a solicitor to become a barrister, or a barrister to become a solicitor, the rules of the profession require that one calling must be entirely relinquished before the other can be undertaken.

Broadly speaking, the solicitor is the so-called "office lawyer," and may handle all phases of a legal problem short of actual pleading in court. He cannot and does not engage in trial work before a court of law or equity. The barrister, on the other hand, represents the advocate phase of the English legal profession, for his job is primarily, though not exclusively, concerned with trial and litigation work. His nearest approximation in the American scene would be the specialized trial lawyer.

A client having a legal problem goes not to the barrister, but to a solicitor, who at his discretion may or may not retain a barrister as counsel. If court work is required or advice of counsel is sought, then the solicitor retains and instructs a barrister to handle the matter. The barrister, as such, has no contact with the litigant other than through the intermediate medium of the solicitor, and his fee comes not from the litigant, but from the solicitor by whom he was retained.

As has been pointed out, the advocate or counsel phase of the English legal profession is reserved to barristers, that is to say, to those who have been

"called to the bar" by any one of the four existing Inns of Court, to-wit: Lincoln's Inn, The Inner Temple, The Middle Temple, and Gray's Inn.

The Inns of Court are those independent, unincorporated legal societies into which barristers are organized and to which every barrister must belong, and which by immemorial custom dating back to the days of the trade guilds possess the exclusive privilege of calling would-be barristers to the English bar, and of disciplining or disbarring their own members. While nominally independent of each other, the four Inns of Court act together in matters affecting their common interests through the medium of a Joint Committee and a Council of Legal Education, and have established uniform rules (known as Consolidated Regulations) governing the admission, education, and calling of students, and standards of professional conduct.

As now constituted, there are three ranks of members in the Inns of Court, viz., students, barristers, and "benchers." The benchers constitute the governing body of a particular Inn, and usually consist of successful practitioners who have donned the silk (that is, become KCs or King's Counsel). Numbered among the benchers of each Inn is usually a member of the royal family. Among the present royal benchers are King George VI (Inner Temple), Queen Elizabeth (Middle Temple), the Duke of Gloucester (Gray's Inn), and the Queen Mother Mary, who became a senior bencher of Lincoln's Inn in November of 1943, and was the first lady bencher in history.

As the governing body of a particular Inn, the benchers have the sole power to fill up vacancies in or add to their own numbers, to call students to the bar, and to exercise disciplinary jurisdiction over members of the society.

In his application for admission as a student to a particular Inn the applicant must (1) declare that he is not engaged in certain enumerated capacities (viz., as a solicitor, notary public, clerk of a court, a chartered accountant, surveyor, consulting engineer, etc.), (2) that he is not engaged in trade, and (3) that he is not an undischarged bankrupt. In addition, the applicant's application must be supported by two character references.

Once admitted to a particular Inn, a student must in general keep twelve terms (of which there are four per year) and pass a bar examination before he can be called to the Bar. Terms are kept by dining in term time in the Hall of the Inn of which the student is a member for six days during each term, though if one is at the same time a member of one of the accredited universities or colleges, such as Oxford or Cambridge, the dining

period is reduced to three days per term.

Having kept the requisite number of terms and passed the bar examination, and having attained the age of twenty-one, a student is eligible to be called to the Bar. This call is generally made on the same day in each of the Inns, and is marked by a colorful and symbolic dinner

". . . and, with THAT *one I got my Junior Life-Saving Badge."* By Albert J. Smith, New York City.

ceremony wherein the benchers (who dine on a raised dais in the Hall) call the newly initiated barrister to their table to join them in a glass of wine (usually sherry or port) to mark his call to the bar.

A fledgling barrister first going into practice is faced with certain obstacles of a much more formidable nature than his American counterpart. For one thing, the ordinary scope of his practice is limited to actual advocacy, to the drafting of pleadings and other legal documents, and advising on questions of law when a solicitor seeks "advice of counsel." Though it is permissible for a barrister to draft wills, conveyances, or other noncontentious documents without the intervention of a solicitor, the everyday grist of the legal mill (and a most lucrative grist at that), such as carrying through a real estate conveyance, or handling the organization or reorganization of a corporate enterprise, or administering an estate, is by and large reserved to solicitors.

For another thing, the barrister is dependent upon the solicitor for his business since the usage and etiquette of the profession forbids a direct counsel-client relationship between a barrister and a litigant. A layman seeking legal advice goes not to a barrister but to a solicitor, who will in turn, if necessary, retain and instruct a barrister to handle the actual court work or give advice of counsel in the matter. It follows from the interposition of the solicitor between counsel and client that the barrister looks to the solicitor for his fee, and not to the client. A solicitor under his general retainer to act for a client has authority to instruct counsel and to pay counsel's fees.

Though the role of barrister carries with it added professional and social prestige, as well as affording added opportunities in

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politics and on the bench (the judges of the high courts are drawn almost exclusively from the ranks of barristers), the barrister is not as much the kingpin of the English legal hierarchy as most Americans, Ephraim Tutt of Arthur Train fame included, are wont to believe. This is particularly true in an economic sense, and while there are established and brilliant barristers who have made large fortunes in the field and can afford to risk offending the sensibilities of solicitor firms desirous of retaining them, they are not very numerous.

But getting back to our young barrister. Having been called to the bar, his next step normally is to associate himself with a practicing junior barrister as an apprentice or "devil" for a period of anywhere from a few months to a few years. This apprenticeship period is called "deviling," and consists of doing the leg work and detail work which in American law firms are normally assigned to law clerks or newly admitted junior associates. It should be understood, however, that the "devil" is in no way an employee or personal associate of the junior, since such relationships are forbidden by the ethics of the profession.

In time, having gained some business "on his own" from the solicitors, our young barrister begins to act for himself in the capacity of a Junior. The appellation "junior" has reference to all barristers, devils included, who are not of the rank of King's Counsel, and embraces the great majority of English practitioners. They are sometimes called "stuff gownsmen" to denote the fact that they wear stuff gowns and sit outside the bar proper in Court, whereas the KCs or King's Counsel wear silk gowns and sit within the bar as a mark of their higher rank within the profession.

Having attained a degree of prominence and distinction in the practice, a junior may then

apply to "take silk;" that is, to become a "King's Counsel" (if he is a common law practitioner) or a "Leader" (if he is a Chancery barrister). Application as such is made to the Lord Chancellor, who, acting on behalf of the Crown, at his discretion grants this distinction to a limited, though not numerically defined, number of distinguished barristers.

One of the lesser known aspects of the English professional scene is the so-called "barrister's clerk," who occupies a role which is peculiar to the English legal profession. He is the middleman between the solicitor and the barrister, and occupies a position in relation to the barrister which is analogous to that of a business agent, office manager, and private secretary rolled into one. His peculiar role arises from the ethics of the profession which deems a barrister above the mundane affairs of money, and his fees as "honorarium" gifts.

A solicitor desiring to "instruct" a barrister (that is, acquaint the barrister with the case being turned over to him) will contact the barrister's clerk, and negotiate with him respecting the fee and arrange for the necessary conferences with the barrister. In theory at least, the barrister is blissfully unaware and unconcerned with the bargaining going on outside his office in respect to the fixing of fees. Legend has it, as a matter of fact, that in the back of the barrister's robe is a pocket into which the solicitor can unobtrusively slip the barrister's fee.

By custom and statute a barrister's clerk is entitled in his own right to certain fixed fees that accrue to him over and above the fee proper belonging to the barrister. The clerk's fee is predicated on the amount of fee paid to his barrister. For example, on each fee under 5 guineas ($21), — English legal fees are invariably expressed in terms of guineas, — the barrister's clerk is entitled to 2s and 6d (50c). On each fee between 30 and 50 guineas he is entitled to £1. For each conference (usually of 20 minutes duration) his cut, to use the vernacular, is 5 shillings. The clerk for one of the former Attorney Generals of England is said to have averaged over £2,000 a year for a number of years by way of such fees.

It might be mentioned here that the barrister's clerk need not have and generally does not have any special qualifications in the law. It has been said, and with good reason, that a prime requisite for a successful barrister is that of having a good clerk. Good clerks have been known to make successful barristers out of men of no marked ability, and conversely, men of talent and brilliance have been known to fail as barristers because of a poor or dishonest clerk.

Less heralded, perhaps, than the barrister, but of at least

equal importance in the professional scheme of things, is the solicitor, the workhorse, so to speak, of the English legal profession.

To qualify as a solicitor one must serve a period of apprenticeship (known as serving one's articleship) as an "articled clerk" under a qualified solicitor, and pass a series of written examinations. This period of apprenticeship normally runs anywhere from three to five years, depending on the would-be articled clerk's educational background. In the case of a university graduate from an accredited school, or of a former barrister of less than five years standing (remember that a barrister must first have himself disbarred as such before he can become a solicitor), or of an ordinary clerk who has had ten years of service with a solicitor, the period of articleship is three years. In the case of colonial solicitors, or former barristers of five years or more standing, the apprenticeship period is totally waived.

The apprenticeship relation between a solicitor or master on the one hand, and the would-be articled clerk on the other, is marked by a formal, written contractual agreement known as "The Articles," under which the articled clerk binds himself to serve his period of articleship with a particular solicitor of his own choosing. This solicitor, by the way, must have been in practice for at least five years, and must have obtained the special leave of the Law Society to take an articled clerk. The Articles, which must be registered with the Law Society (the solicitor's equivalent to our local bar association), provide that the articled clerk, in return for the privilege of serving his apprenticeship with the particular solicitor, will pay the said solicitor a yearly fee during his period of articleship. This fee varies according to the renown and reputation of the solicitor under whom one serves, and is said to average about 100 guineas ($424) per year in the case of a good solicitor. The solicitor, on his part, agrees to train the clerk and to use his good efforts once the period of service under the articles has been completed to have the clerk admitted to the rolls as a solicitor.

However desirable the apprenticeship system might be in terms of providing a would-be solicitor with a practical background in the law, the fact remains that the necessity of serving a non-remunerative period of apprenticeship (during which the articled clerk cannot engage in other employment) has almost invariably operated to exclude from the ranks of English solicitors all except those of independent means.

While serving his articles the articled clerk prepares for certain examinations which he

must pass before he can be admitted to practice as a solicitor. These examinations are normally given three times a year under the auspices of the Law Society of London, and consist of a preliminary, intermediate, and final examination. In addition, the Law Society holds a voluntary examination for those successful candidates of the final examination who desire to obtain honors.

The preliminary examination, which must be successfully hurdled before registering one's articles, but which may be waived by those having a university degree, includes the following subjects:

(a) writing from dictation,
(b) writing a short English composition,
(c) arithmetic, algebra up to and including simple equations, and geometry as treated in Euclid books 1 to 4,
(d) geography of Europe and history of England,
(e) Latin,

"Hereafter, when you make up a foursome, Beadsley, please confine yourself to members of the legal profession."

(f) if algebra and geometry are not taken, another language (either ancient Greek, French, German, Spanish or Italian) must be taken.

The intermediate examination includes such subjects as the law of real property, contracts, torts, constitutional and public law, and trust accounts and bookkeeping. If one has a law degree from an accredited university in the United Kingdom, then the intermediate examination, with the exception of the section dealing with trust accounts and bookkeeping, may be waived. This examination may be taken at any time after registering for articles if one's period of articleship is for three or four years. Otherwise, it cannot be taken until after one year of service.

Attendance for a period of at least one year at a course of legal education at an approved law school is required from articled clerks as a condition of proper service under articles, and also as a condition of admission to the final examination. Exempt from such attendance are former barristers, graduates of certain accredited universities, and any preson who before being articled has duly served as a clerk to a solicitor for ten years.

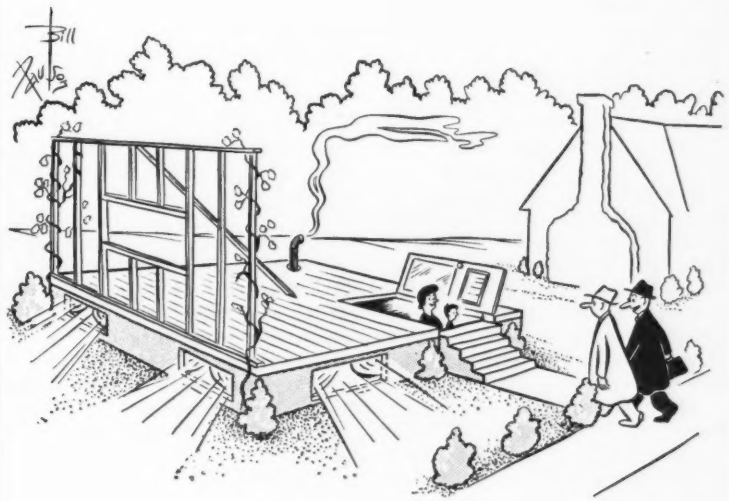
The final examination, which must be taken prior to the expiration of one's term of service and from which only certain colonial solicitors are exempt, is the equivalent of our bar examination. It consists of four compulsory papers dealing with separate groups of general legal subjects, and one of four optional papers dealing with admiralty, patent, administrative, or conflict of laws and divorce questions. Whether justified or not, it was a common complaint and a source of pride, as well, among solicitors with whom the author spoke, that the final law examination for solicitors is much more difficult than the bar examination taken by barristers.

The solicitor is a man of law business, not an advocate. It is to the solicitor that a prospective litigant must initially come for advice, and it is he who conducts all the negotiations for settlement which usually precede a law suit. It is his name that appears as attorney of record, and it is he who files an appearance on behalf of a defendant client. The general authority of a solicitor also includes the power to receive payment or tender of debt, to accept service, to place an execution, and to retain a barrister either for trial or for advice of counsel.

Most young solicitors first starting out in practice usually associate themselves as "managing clerks" (pronounced with a broad English "a," so that one in effect says: "clark") in an existing solicitor firm on a straight salary basis. Unlike barristers, solicitors can enter into a pro-

fessional partnership with each other, and such a partnership is the eventual goal sought by most solicitors. In fairly large firms, in addition to the partners, there are senior and junior managing clerks (our equivalent of senior or junior associates), unadmitted clerks (*i.e.* non-articled clerks who are not solicitors), and the articled clerk or clerks.

Not the least charming aspect of life in a London law office is the delightful English custom of tea. Promptly at 4:00 P. M., the office boy appears with a cup of English tea and buttered slice of bread or crumpets. It is amazing at times how an otherwise reticent Englishman will relax over a cup of tea. The writer came home convinced that the adoption of such a custom by American law firms (substituting coffee for tea, of course) would go a long way toward teaching American attorneys how to relax.



"It's the latest thing in Expandable Homes. It expands upwards when I get another client."

Who Shot Patrick Carr?

By DANIEL J. GILLEN
Associate Justice of the Municipal Court of the City of Boston

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IT is my purpose in these few pages to set forth the facts relative to the Irishman, Patrick Carr, who was a Martyr to the cause of American Independence in the Boston Massacre. At the time of his death he was thirty years of age and employed by Mr. Field, a leather breeches-maker, in Queen Street, now Court Street, Boston.

Five people died as a result of the shooting by the British soldiers on that fateful night of March 5, 1770, — Crispus Attucks, John Caldwell, Samuel Maverick, Samuel Gray and Patrick Carr — several others were wounded.

History tells us that the British soldiers quartered in Boston ruled with an iron hand previous to the Massacre. So fearful were the townspeople, that it was customary when they went out at night, to arm themselves with walking sticks, clubs and swords as a means of protection.

The soldiers led brawling, riotous lives; assaulted the citizens; disturbed church services on Sundays; made the quiet streets hideous by night with their drunken shouts. On one occasion they seized five townsmen and impressed them for service on the British Frigate "Romney" as she lay at anchor in the harbor. A few days before the Massacre the soldiers had a "run in" with some of the inhabitants at the rope walk. This affair turned out to be an anti-climax, and the bitterness between them left animosities at a "fever pitch."

On the night of March 5th a group that had gathered in front of the Custom House was ordered away by the guard of soldiers, and while scores looked on from nearby points of vantage, words were exchanged, to be quickly followed by the tragic event that was destined to be a high point in the history of America.

Three murder trials followed and all were held in His Majesty's Superior Court of Judicature.

In the first, Captain Preston of the British Army was found not guilty — obviously because

there was a conflict of testimony as to whether or not he gave the order for the soldiers to fire.

In the second, eight soldiers were tried as principals and accessories to the murders of the five victims.

In the third, certain persons who were supposed to have fired on the patriots from the Custom House windows were all found not guilty.

No minutes exist of the first and third trials. But at the second trial a shorthand writer was employed and from his minutes a very full report was made and reprinted in 1807 and 1821.

This was the most famous and historic murder trial in the annals of Boston. The prosecutors were Robert Treat Paine and Samuel Quincy, the defense counsel John Adams and Josiah Quincy assisted by Sampson Salter Blowers.

In passing it is of interest to note that Samuel and Josiah Quincy were brothers and some years later Blowers and Samuel Quincy both became tories and left the country.

All the soldiers were found not guilty of murder but two of them, Montgomery and Killroy, were found guilty of manslaughter and were "burnt in the hand" in open court as punishment.

The evidence indicated that Montgomery fired the shot that killed Crispus Attucks; and Killroy the shot that mortally wounded Samuel Gray. Apparently the confused state of the evidence as to which of the remaining six soldiers fired the shots that killed the three other victims brought about the not guilty verdicts.

In general, the testimony was conflicting as to whether or not the actions of the civilians warranted the amount of force used by the soldiers.

The government contended that the blame for the incident was attributable to the soldiers and that the circumstances were not such as to warrant the shooting of the victims.

The defense was that the group of people close to the guard created a "riot" and the soldiers fire into the "mob" in self-defense.

But the jury by its verdict held that more force was used than was necessary and it would follow that it was thereby legally determined for all time, that there was no "mob" present and no "riot" existed.

Carr's part in the Massacre, in my opinion, was imprudently handled by John Adams in his final argument to the jury and herein lies the shadow I seek to remove.

John Adams said in his final argument.

"They (*the soldiers*) were a lawful assembly, and the people attacking them were by every principle a mob. We have been entertained with a great variety of phrases to avoid calling this sort of people a mob. Some call

them shavers, some call them geniuses. The plain English is gentlemen, most probably a motley rabble of saucy boys, Negroes and Mulattoes, Irish teagues and outlandish jack tars. And why we should scruple to call such a set of people a mob, I cannot conceive unless the name is too respectable for them. The sun is not about to stand still or go out, nor the rivers to dry up because there was a mob in Boston on the fifth of March that attacked a party of soldiers. Such things are not new in the world nor in the British dominions, though they are comparatively rarities and novelties in this town. Carr, a native of Ireland had often been concerned in such attacks, and indeed, from the nature of things soldiers quartered in a populous town will always occasion two mobs where they prevent one. They are wretched conservators of the peace ———. And it is in this manner, this this town has been often treated; a Carr from Ireland, and an Attucks from Framingham, happening to be here, shall sally out upon their thoughtless enterprises, at the head of such a rabble of Negroes and etc., as they can collect together and then there are not wanting persons to ascribe all their doings to the good people of the town."

Why should John Adams twist the evidence in the manner he did?

There was no testimony that Carr at any time had been concerned in a riot, anywhere. True, he was credited with saying on his death bed that he had seen riots in Ireland but the evidence went no further. Carr did not sally out at the head of any mob. He watched the people close to the soldiers from a distant point as did many of the townspeople. Was that a crime?

No one will question the courage of John Adams in taking over the defense of the soldiers. But should the good name of anyone be handled lightly in order to free them?

It does not seem possible that this keen, alert barrister, then in his prime, was unable to follow the evidence and fell into error. Rather does it appear that at this trial he was just a lawyer with the job of successfully defending his clients as the paramount task, so a little stretching of the evidence here and there was necessary to fit it to the pattern of the defense theme.

On the monument on Boston Common erected to the memory of the victims of the Massacre are two inscriptions.

The one from the pen of Daniel Webster reads: "From that moment we may date the severance of the British Empire."

The other from the pen of John Adams reads: "On that night the foundation of American Independence was laid."

Did Adams in later life change his opinion of what transpired on March 5, 1770?